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No. 99-1862

Supreme Court, U.S.
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In The

Supreme Court of the United States

REXFORD KIPPS, CAROL KIPPS AND KYLE KIPPS,

Petitioners,

versus

JAMES CAILLIER, RAY AUTHEMENT, NELSON J. SCHEXNAYDER, JR. and NELSON STOKELY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WAS THE COURT OF APPEALS CORRECT IN APPLYING THE DOCTRINE OF QUALIFIED IMMUNITY TO DISMISS PETITIONERS' 42 U.S.C. § 1983 CLAIMS?

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STATEMENT OF THE CASE

Relevant Proceedings Below

On July 22, 1997, Petitioners instituted an action in the United States District Court for the Western District of Louisiana, asserting that the Respondents, while acting under color of state law, violated Petitioners' constitutional rights of privacy and association in violation of 42 U.S.C. § 1983.

On November 10 and 12, 1997, Respondents Authement, Schexnayder and Stokely and Respondent Caillier pled the affirmative defense of qualified immunity, respectively. Subsequently, Respondents filed a Motions for Summary Judgment on March 17, 1998 and March 27, 1998, respectively, arguing in part that qualified immunity barred Petitioners from making their claims against Respondents under the specific set of factual circumstances as alleged in the Petitioners' Complaint. Respondents based their Motion for Summary Judgment upon several factors which included: (i) Rexford Kipps was an at-will employee pursuant to the articulated policy of the Board of Trustees for State Colleges and Universities; (ii) discovery established that the decision to attend a particular university was Kyle Kipps' to make and his to make alone; (iii) Rexford Kipps' direct supervisor was Nelson Stokely, not Dr. Ray Authement, Nelson J. Schexnayder, Jr. or James Caillier; (iv) Dr. James Caillier served as an employee of the Board of Trustees for State Colleges and Universities which, in turn, is the constitutionally created Management Board for all state colleges under its jurisdiction, one of which was the University of Southwestern Louisiana ("U.S.L."); (v) the Management Board consists

of members appointed by the Governors who serve for staggered terms and are charged with promulgating rules, policies and procedures for the member colleges and who are vested with the voting authority in such management duties; (vi) Dr. Caillier, as an employee of the Board, served as President of the system and Secretary to the Board, but neither served as a Board Member, nor held voting status in his employment position; (vii) Stokely, as head football coach at U.S.L., terminated Rexford Kipps on February 12, 1997, pursuant to the Board Rules, Policies and Procedures and forwarded notice of such action to Schexnayder as Athletic Director; (viii) Schexnayder presented the notice of the job action to the University President, Authement; (ix) Dr. Caillier presented to the Board an *in globo* University Budget Report which included employment of a new U.S.L. coach in August, 1997, which was in fact approved by the Board members *in globo*; (x) Discovery established that Dr. Caillier neither received advanced notice of the termination of Kipps nor consulted with any of the members of the Kipps family nor other Respondents regarding Kipps' employment prior to his termination; (xi) Kipps never appealed the termination to the Board of Trustees; (xii) Respondents had a reasonable, good faith belief that it was constitutionally permissible for an at-will assistant football coach to be terminated; (xiii) Rexford Kipps' continued employment as an assistant football coach would have impaired the operation and/or effectiveness of the U.S.L. football program; (xiv) the family cannot share the elements of 42 U.S.C. § 1983; (xv) Petitioners' Complaint did not establish a compensable familial

association-based claim; and (xvi) Petitioners' Complaint did not establish a compensable retaliatory claim.

Within the body of its Ruling on Respondents Authement, Schexnayder, and Stokely's Motion for Summary Judgment, the District Court ordered Respondents to produce certain tangible evidence in support of their claim of justification in terminating Rexford Kipps. Pursuant to this Ruling, Respondents submitted a Supplemental Memorandum which included the entire deposition testimony of Spike Dykes, former Head Coach for the Texas Tech University.

On August 18, 1998, and August 28, 1998, respectively, the District Court granted Respondents' Motions for Summary Judgment based upon qualified immunity and concluded that it found "the facts established purport to show that the defendants' motivation was reasonable. Plaintiffs, moreover, have failed to show that defendants knew or should have reasonably known that their actions would violate the constitutional rights of plaintiffs." The Court further noted in its August 28, 1998 Ruling, which granted Respondent Caillier's Motion for Summary Judgment, that the "argument is substantially similar to the reasoning of" the previous Ruling on August 18, 1998.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. This Appeal was denied and the Judgment of the District Court was affirmed. The Court of Appeals also concluded that Respondents were entitled to qualified immunity because their actions were objectively reasonable. *Kipps v. Caillier*, 197 F.3d 765 (5th Cir.1998). Petitioners filed a

Motion for Rehearing and Suggestion for Rehearing *En Banc*, which was denied by the Court on February 25, 2000. The Court of Appeals reaffirmed its conclusion that Respondents were entitled to claim qualified immunity. Petitioners then filed the instant Application for Writ of Certiorari.

Relevant Factual Elements

The Rules promulgated by the Board of Trustees for State Colleges and Universities require that an assistant football coach be an "at-will" employee. The University of Southwestern Louisiana was under the jurisdiction of the Board of Trustees for State Colleges and Universities.

Rexford Kipps was employed as an assistant football coach at the University of Southwestern Louisiana through June 30, 1997.

Carol Kipps was employed in a civil service position classified as Clerk III in the administration at the University of Southwestern Louisiana from 1986 to October 1997. It was not asserted by plaintiffs that Carol Kipps suffered any retaliation or other adverse job action until the time she voluntarily resigned from the University of Southwestern Louisiana in October of 1997.

Kyle Kipps was born on October 10, 1978, and reached an age of majority on October 10, 1996.

Nelson Stokely was the Head Football Coach at the University of Southwestern Louisiana at all times pertinent herein and held that position from 1986 until his resignation in November of 1998. Nelson J. Schexnayder, Jr. is the Director for Athletics for U.S.L. and has held that

job since 1994. Dr. Ray Authement is the President of U.S.L. and has held that position from 1974 to present. Dr. James Caillier served as President of the State Colleges and University System and Secretary to the Board of Trustees.

In 1979, Rexford Kipps was given the position of defensive line coach, an assistant coaching position, at the University of Richmond. He was employed as an "at-will" employee. In 1979, Rexford Kipps was terminated as an assistant football coach at the University of Richmond; his termination was not the result of any actions or inactions on his part. In 1980, Rexford Kipps took a job as a graduate assistant football coach at Clemson University. In 1983, he left that position to take the defensive line coach's position at the University of East Carolina. He was employed as an assistant coach and the position was "at-will." In 1985, after a poor season, the entire coaching staff, including Rexford Kipps, was terminated. Rexford Kipps' termination was not the result of any actions or inactions on his part. In 1986, Rexford Kipps took the defensive line coach's position at U.S.L., under Respondent Stokely, as an assistant coach.

Nelson Stokely was employed as an assistant football coach at Virginia Tech University in 1977 and was an "at-will" employee. Nelson Stokely was terminated as an assistant football coach at the Virginia Tech University and his termination was not the result of any actions or inactions on his part.

During his tenure as head football coach at U.S.L., Nelson Stokely had Jack White and Louis Cook, "at-will"

assistant football coaches, resign employment from U.S.L. to take other positions.

An individual employed as an assistant football coach for the U.S.L. football program is required to coach student athletes in the football program, to recruit students athletes to play for U.S.L., and to help develop positive relations with the university's alumni and other university supporters. An individual employed as an assistant football coach for U.S.L. acts as a salesman when recruiting student athletes to the football program.

Kyle Kipps enrolled at Louisiana State University ("L.S.U.") in August of 1997, and is currently enrolled at that university. Carol Kipps did not relate to Kyle Kipps any discussions she or her husband allegedly had with U.S.L. officials concerning Kyle Kipps' selection of a university to attend. Rexford Kipps did not relate to Kyle Kipps any discussions he or his wife allegedly had with U.S.L. officials concerning Kyle Kipps' selection of a university to attend.

The following alumni and other supporters of the university's football program advised Nelson Stokely that they did not believe Rexford Kipps could effectively execute his job duties as an assistant football coach at U.S.L. after February 5, 1997: Dr. Phil Cramer, M.D., Tony Mannina, Mel Credeur, Jim Cramer, and "Lefty" Lafferty.

It was Nelson Stokely's belief that the continued employment of Rexford Kipps as an assistant football coach would have impaired the effectiveness and/or operation of the U.S.L. Football Program in that Rexford Kipps could not have been an effective recruiter of student athletes, and he would not be able to effectively help

develop positive relations with alumni and other supporters of the Football Program.

An "at-will" assistant football coach at U.S.L. was directly supervised by the head football coach at U.S.L. The Director of Athletics for U.S.L. did not directly supervise an assistant football coach employed by U.S.L. Nelson J. Schexnayder, Jr., in his capacity as Athletic Director for U.S.L., did not supervise the employment activities of Rexford Kipps. The President of U.S.L. does not directly supervise an assistant football coach employed by U.S.L. Dr. Ray Authement, in his capacity as President of U.S.L., did not directly supervise the employment activities of Rexford Kipps. Dr. Caillier, as President of the System and Secretary to the Board, does not directly supervise an assistant football coach at U.S.L.

Nelson J. Schexnayder, Jr. received no advance notice that Rexford Kipps would be terminated as an assistant football coach with U.S.L. Dr. Ray Authement received no advance notice that Rexford Kipps would be terminated as an assistant football coach with U.S.L. Dr. James Caillier received no advance notice that Rexford Kipps would be terminated as an assistant football coach with U.S.L.

Nelson Stokely, as head football coach at U.S.L., had the authority to hire and fire assistant football coaches at his discretion.

The financial support from alumni and other supporters of the Athletic Department accounted for twenty-eight percent (28%) of the total Athletic Department budget revenue for the fiscal year beginning July 1, 1995, and ending June 30, 1996. The financial support from alumni

and other supporters of the Athletic Department accounted for thirty-three percent (33%) of the total Athletic Department budget revenue for the fiscal year beginning July 1, 1996, and ending June 30, 1997.

The decision concerning what universities to select for recruiting visits was a decision made by Kyle Kipps. The decision concerning what university to attend in the Fall of 1997 was a decision made by Kyle Kipps. An individual who reaches the age of majority may attend any university he desires. Kyle Kipps received advice concerning what university to attend from one (1) of his high school football coaches, Zebulan Simon.

PERCEIVED MISSTATEMENT OF FACT OR LAW IN THE PETITION WHICH BEARS ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WAS GRANTED

Petitioners made the following assertions within their Petition to which Respondents maintain their adamant denial:

> Respondent Stokely, Head Football Coach, University of Southwestern Louisiana and Rexford Kipps' immediate superior, aggressively interfered and intruded himself into Petitioners' private zone of familial interaction and discussions regarding Kyle's future career as a football player. Respondent Stokely strongly intimated to Rexford Kipps that under no circumstances should Kyle enroll as a football player and student at any university in Louisiana other than USL. Further, he threatened Rexford Kipps with termination of his employment as an assistant

> football coach at USL if Kyle were to enroll at any other Louisiana university. Thus, Respondent Stokely held hostage Kipps' coaching employment with USL as a means of coercing Kipps into compelling his son to play football at USL, thereby interfering with Petitioners' free exercise of their right to privacy and familial association.

(Petitioners' Petition for Writ, pg. 4). Continuing on this theme, Respondents deny the following:

> As the recruiting deadline became imminent, the intensity of Stokely's interference with the family's discussion of Kyle's education and his future life increased.

(Petitioners' Petition for Writ, pg. 5).

The aforementioned assertions, made by Petitioners in the "STATEMENT OF FACTS" Section of their Petition are incorrect. Petitioners have repeatedly raised these inaccurate accusations throughout this case. At no time did Respondent Stokely aggressively interfere and intrude himself into Petitioners' private zone of familial interaction and discussions regarding Kyle Kipps' future career as a football player. At no time did Respondent Stokely threaten Rexford Kipps with termination if Kyle Kipps were to attend any other university in Louisiana. Thus, Respondent Stokely never held Rexford Kipps' employment hostage in an attempt to coerce Rexford Kipps into compelling Kyle Kipps to play football at U.S.L.

A reading of the pertinent portions of the discovery depositions paints a very different picture from the one painted by Petitioners. Above and beyond the fact that

Rexford and Carol Kipps could not legally direct the educational choice of Kyle Kipps in this matter, the evidence established in the course of discovery illustrates that they did not direct the educational choice of their son.

The existence and substance of any conversations between Nelson Stokley and Rexford Kipps are the subject of a vigorous factual dispute. However, there is no factual dispute, genuine or otherwise, that Rexford Kipps did not relate any of these alleged discussions to Kyle Kipps. (Rexford Kipps depo. pgs. 86, 87). Carol Kipps also testified in her deposition that any discussions between U.S.L. employees and Rexford and Carol Kipps concerning Kyle Kipps' college choice were not related to Kyle Kipps. As Carol Kipps testified:

> Q. All right. Now, your husband told us that he never shared with Kyle any of those discussions?
>
> A. No, sir.
>
> Q. And I take it that you didn't share with Kyle any of those discussions?
>
> A. No, sir.

(Carol Kipps depo pg. 51).

This is further corroborated by Kyle Kipps' testimony that his parents did not relate to him any conversations concerning what college he should attend. (Kyle Kipps depo. pg. 33).

The testimony of Rexford, Carol, and Kyle Kipps all conclusively establish that any influence allegedly exerted by U.S.L. officials was not conveyed to Kyle Kipps.

For that reason, there was no interference in Kyle Kipps' decision-making process.

Secondly, all three of the Kipps testified that the choice of what school to attend was Kyle Kipps', and Kyle Kipps' alone. (Rexford Kipps depo. pg. 56; Carol Kipps depo. page 34, 39, 74; Kyle Kipps depo. pg. 47). There can be no interference in Kyle Kipps' decision as a result of Rexford Kipps' employment if it was Kyle Kipps' decision to make.

Petitioners' Petition does not contain any pattern of behavior by Dr. Caillier. Deposition testimony of all parties substantiates no one consulted with or notified Dr. Caillier in advance of Rexford Kipps' termination and he was in fact named by the Kipps' family because they believed he had voting authority in his position. (Stokely depo. pg. 173; Schexnayder depo. pgs. 30, 31; Authement's depo. pgs. 62, 62; Rexford Kipps depo. pgs. 115, 116, 117; Carol Kipps depo. pgs. 98, 100, 101; Kyle Kipps depo. pg. 72).

The financial aspect of this decision was not an issue since all the universities were offering a scholarship, which covers room and board, books and tuition. (Stokely depo., pg. 188).

Kyle Kipps was the age of majority at the time he made his selection as to which university he would attend. Legally, he possessed the capacity to make that decision. In addition, the deposition testimony established that factually, all three (3) members of the Kipps family have acknowledged that the decision to attend L.S.U. was Kyle Kipps' and Kyle Kipps' alone to make.

Lastly, the deposition testimony established that any alleged conversations between the Kipps family and U.S.L. officials were not conveyed to Kyle Kipps; as such, there was no interference in Kyle Kipps' decision-making process as it concerned what university to attend.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Correctly Applied The Doctrine of Qualified Immunity As Announced By This Court And As Applied By The Courts Of The Other Circuits In Dismissing Petitioners' 42 U.S.C. § 1983 Claims

Petitioners seek this Court's reversal of the Fifth Circuit Court of Appeals' application of the doctrine of qualified immunity in affirming the District Court's dismissal of Petitioners' claims against Respondents by means of the affirmative defense of qualified immunity. The Court of Appeals committed no reversible error in its affirmation of the District Court's granting of Respondents' Motion for Summary Judgment on the ground of qualified immunity.

a. Qualified Immunity Standard

"Qualified" or "good faith" immunity shields governmental officials performing discretionary functions from liability "unless their conduct violates 'clearly established statutory or constitutional rights which a reasonable person would have known'." *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir.1994); citing *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir.1986), quoting *Harlow v. Fitzgerald*, 457

U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). "The protection afforded by the defense is an 'immunity from suit, not simply immunity from liability'." *Id.*, citing *Geter v. Fortenberry*, 849 F.2d 1550, 1552 (5th Cir.1988).

For a constitutional right to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531 (1987).

b. The Basis For Believing Rexford Kipps Could Be Terminated

The experience of both Nelson Stokely and Rexford Kipps supports that an assistant coach could be hired and fired "at-will." Rexford Kipps was fired from the University of Richmond and East Carolina University. In both instances, the firing had absolutely nothing to do with his conduct. The testimony of Rexford Kipps was that he was fired in both instances as a result of the "actions or inactions" of the head coach for whom he was working.

Similarly, Coach Nelson Stokely had firsthand knowledge of the vagaries of the position of assistant coach. While employed as an assistant at Virginia Tech University in 1977, Nelson Stokely was an "at-will" employee who was terminated without notice when the head coach for whom he worked was terminated. As with Rexford Kipps, Nelson Stokely was not terminated due to anything he did, but rather as a result of the actions or inactions of the head coach. As is implicit from Petitioners' lack of allegations concerning the subject, Rexford Kipps is not a member of any suspect class.

It should be emphasized that there is a flip side to "at-will" employment that has worked for the benefit of numerous assistant football coaches. Nelson Stokely had a variety of assistant football coaches resign from their employment with U.S.L. throughout the pendency of his tenure.

Another fact that makes it "reasonable" for Coach Stokely to believe he could terminate Coach Kipps is that Kyle Kipps was eighteen (18) at the time he committed to play football at L.S.U. A student who is the age of majority may attend any university he so desires without his parents' consent.

Respondents reiterate Nelson Stokely, Nelson J. Schexnayder, Jr. and Dr. Ray Authement had a reasonable, good faith belief that it was constitutionally permissible for an "at-will" assistant football coach to be terminated without violating his constitutional right to freedom of association. Additionally, Rexford Kipps and Nelson Stokely were previously terminated from positions as assistant football coaches for no cause and with little warning.

Additionally, several highly respected and influential alumni and financial supporters of the U.S.L. football program approached Respondent Stokely and expressed concerns that they did not believe Rexford Kipps could effectively execute his job duties as an assistant football coach at U.S.L.

The point of the foregoing is that it is entirely reasonable for Respondents to believe that a head football coach in 1997 could, with constitutional immunity, fire one of his assistants.

c. United States District Court August 18, 1998 Ruling

Respondents would then turn the Court's attention to the August 18, 1998 Ruling handed down by U.S. District Court Judge Little. Judge Little specifically found:

> We do, therefore, find the facts established purport to show that defendants' motivation was reasonable. Plaintiffs, moreover, have failed to show that defendants knew or should have reasonably known that their actions would violate the constitutional rights of the plaintiffs. As such, this court grants defendant Authement, Schexnayder and Stokely qualified immunity. Plaintiffs' claims against these three defendants, therefore, are dismissed with prejudice.

The Court, in its following Ruling which granted Dr. Caillier's Motion for Summary Judgment, noted that the arguments on immunity were substantially the same and therefore did not need reiteration.

Respondents assert that based upon an application of the governing standard of review and law, nothing exists in the record, in Judge Little's Ruling, or in the two (2) Judgments of the Fifth Circuit, which merits a reversal of the Court of Appeals' application of the doctrine of qualified immunity in affirming the District Court's dismissal of Petitioners' claims against Respondents.

d. Fifth Circuit Court of Appeals' Decisions Concerning Qualified Immunity

i. The December 9, 1999 Decision

The Fifth Circuit Court of Appeals correctly found that Respondents acted with objective reasonableness when Rexford Kipps was terminated. Within the body of its December 9, 1999 Decision, the Fifth Circuit Court of Appeals specifically addressed the issue of qualified immunity as it related to the relevant facts of the instant matter. The Court pertinently ruled:

> The record indicates that Kipps was fired because his son chose to play football for a Louisiana school other than USL. Notwithstanding the defendants' subjective motivation and belief as to the lawfulness of their conduct, (footnote omitted) we find the defendants' motivation for terminating Kipps was objectively reasonable. See *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir.1990) (holding that "even an officer who subjectively intends to act unreasonably is entitled to immunity if his actions are objectively reasonable") (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Defendants' motivation, according to the record in this case, was to mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts. (footnote omitted)
>
> The summary judgment record of this appeal contains no facts upon which we could find that defendants' actions were objectively unreasonable. The district court's ruling that defendants are entitled to qualified immunity is AFFIRMED.

Kipps v. Caillier, 197 F.3d 765, 768-70 (5th Cir.1999). As such, it is clear that where a public official is performing a discretionary function, he or she is generally granted qualified immunity and shielded from liability insofar as his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The practical application of this means that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.

Respondent Stokely was a public official performing a discretionary function, that of firing an assistant football coach from his at-will position. It is undisputed that the authority to hire and fire assistant football coaches was vested in Respondent Stokely. As such, Respondent Stokely would generally be granted qualified immunity and would be shielded from liability insofar as his conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known. The resolution of this issue turns on whether the Respondents' actions were objectively reasonable, assessed in light of the legal rules that were clearly established at the time they were taken.

ii. The Record Before The Fifth Circuit Court of Appeals

The Fifth Circuit had before it the entire record in this matter, both pleadings and discovery, when it

rendered its decision; that fact cannot be understated. That record included the depositions of Rexford Kipps, Respondent Stokely, Respondent Schexnayder and Coach Spike Dykes. All of these individuals worked in and operated under the particular rules, both written and unwritten, of the world that is college football. Although the Fifth Circuit specifically opined that Rexford Kipps was fired "because his son chose to play football for a Louisiana school other than USL" and found Respondents' motivation was to "mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts", it cannot be understated that when rendering its decision, the Fifth Circuit reviewed and relied upon the insight taken from the above-mentioned individuals. These depositions provided the Fifth Circuit with illustrative information which buttressed Respondents' objectively reasonable belief that in 1997, a college head football coach could, with constitutional immunity, fire one of his assistant coaches.

Both Respondent Stokely and Petitioner Kipps had been personally involved in the seemingly indiscriminate methods of hiring and firing assistant football coaches (Stokely at Virginia Tech University and Rexford Kipps at both the University of Richmond and East Carolina University). It should also be emphasized that there is a flip side to "at-will" employment that has worked for the benefit of numerous assistant football coaches. Nelson Stokely had a variety of assistant football coaches resign from their employment with U.S.L. throughout the pendency of his tenure. Additionally, Respondent Stokely

was receiving pressure from sources outside the immediate program, in the form of alumni and financial supporters who expressed their concern over the fact that Rexford Kipps would be rendered ineffectual as an assistant coach charged with recruiting players and reinforcing alumni relations. The deposition testimony of Coach Spike Dykes, who Judge Parker laureled by opining, "If anyone is an expert in recruiting football talent and alumni relations, Spike Dykes is such a person," provided substantial, corroborative weight to the idea that Respondent Stokely could exercise objective reasonableness and fire Rexford Kipps with constitutional immunity. Finally, the fact that Kyle Kipps was eighteen (18) at the time he committed to play football at L.S.U., and a student who is the age of majority may attend any university he so desires without his parents' consent, makes it "reasonable" for Respondent Stokely to believe he could terminate Rexford Kipps without violating his constitutional rights of familial association.

As stated *supra*, the point of all of the foregoing is that it was entirely reasonable for Respondents to believe that a head football coach in 1997 could, with constitutional immunity, fire one of his assistant coaches.

iii. The February 25, 2000 Decision

The issue of qualified immunity was revisited by the Fifth Circuit Court of Appeals on rehearing. See *Kipps v. Caillier*, 205 F.3d 203 (5th Cir.2000). The Court, upon rehearing, reiterated its previous findings by opining:

> Although we find that Kipps had a clearly established, constitutionally protected right to

> familial association with his son, we continue to hold that the defendants' actions were, under the unique facts of this case, objectively reasonable. (footnote omitted) See *Kipps*, 197 F.3d at 768-700. Therefore, defendants are entitled to qualified immunity for their actions.

Kipps v. Caillier, 205 F.3d at 206. As such, the Fifth Circuit has ruled not once, but twice, that the actions of Respondents were, under the unique facts of this particular case, objectively reasonable. To now suggest that the Fifth Circuit Court of Appeals somehow misapplied the governing standard on qualified immunity, as outlined by this Court in *Wilson* and any number of other cases, is without merit. See *Wilson, et al. v. Layne, et al.*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

CONCLUSION

The issue raised by Petitioners does not merit consideration. The United States Court of Appeals for the Fifth Circuit properly applied the doctrine of qualified immunity, as announced by this Court and as applied by the Courts of the other Circuits, to the unique facts of this particular case on two (2) separate occasions. Consequently, Petitioners' Petition should be denied.

Respectfully submitted,

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